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HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 660.

BILL G. BLUNT, PETITIONER,

VS.

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, RESPONDENT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

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THE STATEMENT MADE BY RESPONDENT.

If, as charged by respondent, petitioner's statement of the case was misleading, it was due to the state of the record.

The bill of exception prepared by respondent (R. 35-36) is at complete variance with the official transcript of the proceedings (R. 63-64). The writer was not present

during the trial and cannot account for this, but felt bound by the choice made by the Appeals Court (footnote 1, 227 Fed. Rep. 2d 312, page 17, pet. cert.). It clearly accepted the version that the trial court stopped the proceedings on his own initiative, albeit the appeals court mistakenly assumed the question concerning notice was asked by counsel for respondent instead of counsel for petitioner.

Respondent's comment that before request for an amendment of the pleading the "plaintiff had already admitted on the witness stand that he did not give notice within 30 days of the accident" requires elaboration. We quote the applicable portion of the record thus:

(The plaintiff is being questioned by his counsel.)

"Q. Now, Bill, did you give any notice to your employer about your getting hurt?

A. No, sir.

Q. Now, while you were in the Hospital—

The Court: Now, just a moment, is the denial of notice under issue in this case, Mr. Newberry (counsel for respondent)?

Mr. Newberry: Your Honor, we denied it and we don't plead it.

The Court: Well, the rule requires—

Mr. Newberry: And we did not take notice under oath.

The Court: The rule requires that the denial be under oath or it be admitted.

Mr. Newberry: Well, we didn't do so, Your Honor.

The Court: Well, we are not trying the denial of the oath unless a denial is made under oath as the rule requires.

Mr. Newberry: Well, I don't want to be arbitrary with the Court.

The Court: It is not a question of being arbitrary. We are not going to try the question of notice, go ahead" (R. 63-64).

In proper perspective this "admission" desperately seized upon by respondent will be seen to have amounted to no more than the beginning by counsel for petitioner to question him on the complete subject of notice, which necessarily would have embraced an inquiry as to whether the respondent had actual notice of petitioner's injury, a fact that would have excused petitioner's failure to give notice (see Article 8307, Section 4a, R. C. S., Texas 1925, Appendix A, page 14, pet. cert.).

The manner in which the question under discussion arose would have been of little moment, had not respondent sought to avoid the effect of the Appeal Court's refusal to apply state law and policy by urging a waiver against petitioner. It is seen that there was no waiver, but positive action on the part of the trial court to prevent the useless trial of a fact that was not issuable under the Texas law.

REPLY TO POINT ONE OF RESPONDENT.

Respondent eagerly asserts the Texas statutory requirement of notice of injury within thirty days to be one of substantive law (its brief, p. 9). It concedes it to be applicable in the Federal Courts, but without so much as a "by your leave," it seeks to avoid the substantive rights given a compensation claimant by the same statute, in the nature of a presumption that the required notice has been given. This presumption becomes no less a substantive right through the circumstance of the contemporaneous creation of a means of avoiding it. The steps to be taken in avoidance constitute conditions precedent to any attack on the

presumption, and the fact that they are to be taken by way of pleading does not alter the substantive characteristics of the original presumption.

The respondent would look to the local law for the bar created by failure of timely notice, but disregard it wherein the same law prescribed the condition alone under which the bar could operate. This would be completely out of harmony with the decisions of this court in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 93 L. Ed. 1524, and *Ragan* v. *Merchants Transfer and Warehouse Co.*, 337 U. S. 530, 93 L. Ed. 1520, 1523, the latter of which holds:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co.* v. *Tompkins* is transgressed."

To us, the ultimate question appears to be whether the statutory provision that relieves a compensation claimant of going forward with proof, and by its fiat proclaims certain things admitted, creates a substantive right, irrespective of the conditions alone under which the right may be challenged. To say that because the presumption may be avoided by the timely filing of a verified plea makes the right created by it procedural, is to beg the question, as we see it. Even if the right be considered partly substantive and partly procedural, surely the dog should wag the tail, and not the tail the dog.

Each of respondent's contentions under its Point One are in complete disregard of the specific holding of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 651, from which we quote as follows:

> "Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading." (This quotation immediately precedes that found on page 10 of the petition for certiorari.)

By the same process of analysis, the Federal Rules of Civil Procedure may cover matters of pleading generally, but they cannot operate to destroy what otherwise would be a valid presumption under state law. Indeed, the presumption created by the Texas statute is of more substantive value to petitioner than was the freedom from the burden of proving contributory negligence to the petitioner in the *Hoffman* case.

The respondent has been the victim of the commentator in 26 *Marq. L. Rev.* 200 (as summarized U. S. C. A. 28, Fed. Rule 8(c), Note 5, page 255). At the time of publication, that unhappy writer proclaimed that by adopting Rule 8(c), this Court had declared the defense of contributory negligence to be a matter of procedure rather than one of substance. The respondent seems to be still barking up this empty tree.

Our position is strengthened by the fact that not only all of the Courts in Texas consider the statutory provision in question to create a presumption, but even the text writers agree, as evidence this quotation from 10 Tex. Jur. 10-Year Supplement, p. 146, Workmen's Compensation, Section 294b:

> "An allegation as to notice of injury which is not denied by the insurer by a verified pleading is presumed to be true as plead."

Hence, we see the presumption viewed as a substantive right, subject to qualification by the filing of a verified plea.

REPLY TO POINT TWO OF RESPONDENT.

Respondent's contention under its Point Two approaches the frivolous. Not the slightest element of waiver of the presumption vouchsafed the petitioner by statute can be gleaned from the record herein. If the transcript is to be believed, the petitioner may have been willing to try out the issue of actual notice or good cause by consent, but it was the trial court which put a stop to the proceedings (see page 2 herein and R. 63-64). On the other hand, if the "bill" (R. 35) is to be accepted, the petitioner objected to the evidential attack on the conclusive presumption of notice erected by statute so soon as it made its appearance. In either event, there is not the slightest indication of a waiver.

In citing *Rosaly* v. *Gonzalez,* 106 F. 2d 169, and cases of similar import, respondent has again lost sight of the presumption created by statute, and treated the missing verification as a mere matter of form. This might have been the case had it dealt only with the pleading, but as we have perhaps tediously reiterated, the statute created a presumption, and the requirement of verification became a condition precedent to its attack. The respondent seems to have been overly cautious in its failure to fully acquaint the Court with the nature of the waiver existing in the case of *Watson* v. *Texas Indemnity Insurance Company,* 210 S. W. 2d 989 (its brief 14), on which it so heavily relies. The truth of the matter is that a verified denial was filed in that case one day before trial, and the appellee did not, and we quote, "by motion or otherwise call the alleged defect to the attention of the trial court at any time during the trial of the cause" (207 S. W. 2d 100). In short, the claimant there allowed the issue to be tried by consent (See Texas Rule of Civil Procedure 67, and F. R. C. P. 15(b)),

and for the first time on appeal sought to rely on the abandoned presumption rather than the record made. It is painfully obvious from the present record that the trial judge (and properly so) was in no mood to put up with the tomfoolery incident to the trial of an issue on which the state law had fastened a conclusive presumption. In fine, the petitioner was in no position to waive the presumption by not demanding verification of the pleading, nor to try the issue by consent, due to the view taken by the trial court.

Be this as it may, the Texas courts have continued to regard the presumption under discussion as conclusive (see petition for certiorari, pp. 7 and 16), as evidenced by this quotation from 27 *Texas Law Review* 565:

> "Prior to the Rules such presumption (of due notice) was conclusive regardless of lack of objection to a defective special plea. *Bedner* v. *Federal Underwriters Exchange,* 133 S. W. 2d 214 (Tex. Civ. App. 1939, error dism'd, judgm't correct). Since the Rules this has continued to be the holding of the courts despite express provision in the Rules for waiver of any defect of form or substance which is not called to the attention of the trial court in writing before the instruction to the jury. Tex. R. Civ., p. 90; *Federal Underwriters Exchange* v. *Hinkle,* 187 S. W. 2d 122 (Tex. Civ. App. 1945, error ref'd want of merit); *Traders & General Ins. Co.* v. *Hill,* 161 S. W. 2d 1101 (Tex. Civ. App. 1942)."

It might interest counsel for respondent to learn that the cases it relies upon, dealing with the waiver of the want of verification of a plea of failure of consideration, are treated in the Law Review article under discussion, and the distinction pointed between the results reached in the two groups of cases.

REPLY TO POINT THREE OF RESPONDENT.

Respondent contends that the trial court erred in failing to permit it to amend its petition (requested for the first time during the taking of testimony), so as to destroy the conclusiveness of the presumption of the timely giving of notice. Aside from the fact that the statute creating the presumption made its attack possible only if a verified pleading contravening it had been on file at least seven days before trial, the question of allowing amendment was addressed to the sound discretion of the trial court.

The obvious purpose of the legislature of Texas in requiring that the verified denial must be filed not less than seven days before the case proceeds to trial was to permit advance preparation on the issue by the claimant. Even had there been no statutory limitation on the time within which an amendment could be allowed, yet no abuse of discretion on the part of the trial court appears in the record in the present case.

CONCLUSION.

We are struck with the Columbus-like courage of counsel for respondent, as manifested by the third and fourth sentences on page 10 of its brief. Of all Texas practitioners, such counsel seem to have been the first to have failed to verify a denial of the timely giving of notice as required by statute, because counsel realized that the form of the pleading would be governed by the Federal practice rather than the state practice. Most of us would have failed to verify through an oversight or an inability to conscientiously make the oath, and in no such spirit of derring-do.

We respectfully submit that the writ should be granted as earlier prayed for.

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PROOF OF SERVICE.

I, Franklin Jones, hereby certify that I served the Respondent herein with a true and correct copy of the foregoing Reply of Petitioner to Brief of Respondent by depositing the same in the United States Post Office, with First Class Postage prepaid, and addressed to counsel of record for said Respondent at his post office address.

This the ..... day of ....., A. D. 1956.

.....,
Of Counsel for Petitioner.

MAR 10 1956
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Respondent.

REPLY OF RESPONDENT

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REPLY OF RESPONDENT

To the Honorable Supreme Court of the United States:

Respondent does not wish to burden this Honorable Court unduly with briefs and arguments, but the "Reply of Petitioner to Brief of Respondent" contains some matters which should not be allowed to go unchallenged.

Most serious is the deceptive quotation from *27 Texas Law Review 565* appearing at page 7 of this Reply of Petitioner. What Petitioner characterizes as a "Law Review article" is in fact merely a casenote by an under-

graduate law student, although this, of course, does not necessarily detract from its value. The questionable factor, however, is the quoting of two sentences from this note out of context in such a way as to imply a position that is actually contrary to the real tenor of the note.

The portion quoted by Petitioner is as follows:

> "Prior to the Rules such presumption (of due notice) was conclusive regardless of lack of objection to a defective special plea. *Bedner v. Federal Underwriters Exchange*, 133 S. W. 2d 214 (Tex. Civ. App. 1939, error dism'd, judgm't correct). Since the Rules this has continued to be the holding of the courts despite express provision in the Rules for waiver of any defect of form or substance which is not called to the attention of the trial court in writing before the instruction to the jury. Tex. R. Civ., p. 90; *Federal Underwriters Exchange v. Hinkle*, 187 S. W. 2d 122 (Tex. Civ. App. 1945, error ref'd want of merit); *Traders & General Ins. Co. v. Hill*, 161 S. W. 2d 1101 (Tex. Civ. App. 1942)."

The immediately following sentence of the very same paragraph, pointedly ignored by Petitioner, proceeds to declare:

> "Later cases, pointing to the supremacy of Rule 90, cast serious doubt upon the validity of these authorities, since they speak of all defects in pleading as falling under this Rule. E.g., *Texas Indemnity Ins. Co. v. Watson*, 207 S. W. 2d 99 (Tex. Civ. App., 1947, rev'd on other grounds, 210 S. W. 2d 989 (Tex. Sup., 1948); *Shaw v. Porter*, supra; *Texas Osage Co-op Royalty Pool v. Kemper*, supra."

In the very next paragraph, this casenote goes on to state:

> "In speaking of the effect of Rule 90, it has been said that 'the protection against reversal on pleading points of *any* nature seems to be reasonably secure. If specific objection thereto is not made in writing, defects of form as well as substance are waived.' Stayton, Pleading Under New Federal and Texas Rules, 20 Texas Law Review, 16, 30 (1942)."

The Article in question by the eminent Judge Stayton further declares:

> "In Texas, faulty pleadings should never cause a reversal of justice on the merits; for if objection is not made, the error is waived, and if objection is made, the error, in reason, is cured."

Thus, Judge Stayton is here in accord with the position of Respondent that, even under the Texas procedure, defect in pleading such as lack of verification is waived if specific objection thereto is not made in writing, and that if such objection is made, the error could be cured by amendment.

Even the casenote writer, from whom Petitioner has borrowed a partial and incomplete quotation, has in fact taken a view in opposition to that of Petitioner, and the note further concludes with the statement that the very purpose of the reform in Texas pleading incorporated in the adoption of the Texas Rules of Civil Procedure in 1941

"would seem to require that Rule 90 should apply in such a situation."

It is also noted that Petitioner now apparently seeks to discredit the bill setting part of the record, stating it to be "at complete variance with the official transcript of the proceedings." Of course, the very reason that the bill was entered by the Court was that the reporter's transcript was understandably inaccurate in attempting to take down the rapidfire conversations back and forth between the Court and counsel. This bill was not only signed by the Court, but, as we previously pointed out, was approved by the signature of counsel for both sides. Thus, Petitioner not only did not object in any way to the bill, but actually approved the same through the signature of Petitioner's counsel. We agree, however, that it is of little moment whether the lack of verification was raised by the Trial Court or by Petitioner when the incident occurred.

It is noted that Petitioner continues to refer to "the statutory provision," "the presumption created by the Texas statutes," and "the statute creating the presumption." As was shown in Respondent's previous Brief, the statute in question, Article 8307b, is now of mere historical interest, and the status of the requirement of verification, as recognized by all of the cases since the adoption of the Texas Rules of Civil Procedure, is that of a Rule of

Court and it derives its present effect from Rule 93(n) of the Texas Rules of Civil Procedure.

In view of Petitioner's position in apparently attaching some magical significance to the wording of the requirement of verification in terms of a presumption, the case of *American Casualty & Life Co. v. Butler, 215 S. W. 2d 392, er. ref., n. r. e.,* becomes very pertinent. That case involved Art. 5546, Texas Civil Statutes, which sets forth the substantive law concerning contract stipulations for notice of a claim for damages (providing that such a stipulation must be reasonable and that the period within which notice shall be given must be no less than 90 days), and then goes on in the same article to make the procedural requirement of verification of a plea of want of such notice:

> "In any suit brought under this and the preceding article, it shall be presumed that notice has been given unless the want of notice is especially pleaded under oath."

The court holds that this requirement of verified pleading, worded as a presumption, is waived by failure to except to the answer on that ground, declaring:

> "Appellee did not except to appellant's failure to verify its pleadings, hence may not claim that, by appellant's defective plea, notice will be presumed by Art. 5546, Rule 90, Texas Rules of Civil Procedure."

The parallel to the present situation is clear. It is also to be noted that the procedural portion of Art. 5546 is now

contained in Rule 93(m) of the Texas Rules of Civil Procedure.

Respectfully submitted,

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By .....
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CERTIFICATE OF SERVICE

I, Royal H. Brin, Jr., as one of counsel for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that I served true and correct copies of the foregoing Reply of Respondent upon Petitioner by depositing the same in the United States Post Office with first class postage prepaid, addressed to John W. Hardy, 711 Bryant Petroleum Building, Tyler, Texas, and Franklin Jones, P. O. Box 347, Marshall, Texas, Petitioner's attorneys of record, on this the ..... day of ....., 1956.

.....
Attorney for Respondent.